IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

W. A. NAILLING,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No.....

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Lower Courts.

No opinion was filed in the District Court nor with the order of the Circuit Court of Appeals originally affirming the judgment. Its opinion or order denying the petition for a rehearing is as follows:

> "This case came on to be heard upon the petition for rehearing, the brief in support thereof, the answer of the appellee thereto, and the reply to the brief of the appellee; on consideration whereof, it appearing that the appellant was convicted of selling narcotics in violation of Section 2554 (a), I. R. C.:
>
> And it appearing that appellant has been tried twice under the indictment herein; and that the principal questions raised in the petition for rehearing were not called to the attention of the Dis-

trict Court, the record showing that no demurrer was filed, no application for a bill of particulars was made, no objections or exceptions were taken and no request was made to charge the jury; and it appearing that these questions were not raised at the hearing on the merits in this court, and that the judgment is not to be reversed under such circumstances unless clear miscarriage of justice is shown; *Miller vs. United States*, 300 Fed. 529 (C. C. A. 6), certiorari denied, 266 U. S. 624;

And it appearing that while the indictment charges that the sale of morphine sulphate was not made in pursuance of a written order on a form issued by the Commissioner of Internal Revenue, and Section 2554 (a) requires that the order be written on "a form to be issued" by the Secretary of the Treasury, the Secretary is authorized by statute to delegate and has delegated authority to the Commissioner of Internal Revenue to issue such order forms. Act of March 3, 1927 (44 Stat. 1381, Sections 4 (a) and 4 (b); Treas. Dec. No. 3999, issued March 18, 1927; Treas. Dec. No. 1 (Bureau of Prohibition), issued April 1, 1927; Act of June 14, 1930 (46 Stat. 585, Section 3 (b); Treas. Dec. No. 2 (Bureau of Narcotics), issued July 1, 1930; Section 2606, Title 26, I. R. C.; Treas. Dec. No. 4884, issued February 11, 1939;

And it appearing that the indictment sufficiently apprised the appellant of the charge against him and is sufficiently specific to bar a second conviction for the same offense, and that there is no clear miscarriage of justice shown by the present record:

It is ordered that the petition for rehearing be, and it hereby is, denied."

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (U. S. C. A., Title 28, Sec. 347).

The order denying the petition for a rehearing, seasonably filed and entertained, was denied February 9, 1942, and this petition for the writ of certiorari is filed within the time allowed by Rule XI of the Rules of Practice and Procedure adopted by this Court May 7, 1934.

The transcript of the record, including proceedings in the Circuit Court of Appeals, has been filed herewith as required by Rule 38 of this Court.

III.

Specifications of Error.

(1) The indictment herein, and for reasons shown in the petition, does not state an offense under Section 2554 of the Internal Revenue Code.

(2) The Circuit Court of Appeals erred in failing and refusing to apply corrective processes when it was brought to its attention by the petition for rehearing that the undisputed evidence showed that the prescriptions complained of in the indictment were issued by petitioner in the course of his professional practice and as such were not within the operation of Section 2554 of the Internal Revenue Code.

(3) The Circuit Court of Appeals erred in failing and refusing, when requested so to do by petition for re-

hearing, seasonably filed and entertained by that Court, to protect petitioner against an arbitrary and unconstitutional application of Section 2554 whereby he was punished for acts that were not within the scope thereof and could not be brought under its operation without a violation of the 10th Amendment to the Federal Constitution.

(4) The Circuit Court of Appeals erred in failing and refusing to hold that in the absence of any evidence showing an approved or generally accepted standard of professional practice in treating addicts, that a verdict of guilt could not be predicated upon the conflicting opinions of medical experts as to what constituted proper professional practice.

IV.

Material Facts.

Petitioner, 69 years of age, was a highly trained physician and surgeon (R. 148, 149, 205). He owned and operated a hospital and clinic at Union City, Tennessee, from 1912 to the date of his trial, and during that period had personally performed thousands of operations (R. 149). His practice was extensive (R. 46, 52, 88, 149), successful (R. 211), and he owned a large amount of property in and around Union City, including his hospital building, other business property, a half interest in a manufacturing establishment, thirty-five or forty residences, and six or eight farms. During his cross examination, and over his protest, petitioner was required to list these properties which the Government attorney insisted had an assessed valuation of $250,000 (R. 166-168).

Issuing narcotic prescriptions was an inconsequential part of his general practice. There was nothing unusual about these prescriptions, filled and preserved by local druggist, nor were they out of line with those issued by other doctors (R. 45, 51, 89, 94, 115, 213, 217).

An unusual array of character witnesses, both men and women, including farmers, merchants, bankers, physicians, lawyers, ministers, state and federal officials, testified to his good reputation (R. 200, 221-231).

On or about the dates alleged in the several counts of the indictment on which convictions were had, covering a period from June 1 to June 9, 1940, petitioner issued prescriptions to one Harry P. Dezonia, a drug addict, issuing him a prescription on each day during that period except June 2. Each of these prescriptions called for twenty one-fourth grains of morphine sulphate or a total of five grains of that drug. (R. 43.)

All of these prescriptions were issued by petitioner in his office and while Dezonia was there in person (R. 109, 199, 200).

Dezonia, 59 years of age, was chief dispatcher and train master for the Illinois Central Railroad when he acquired the drug habit in 1921 as the result of a treatment to relieve pain which he suffered from chronic catarrhal sinus (R. 107).

At the time of the transactions involved in the indictment, Dezonia was temporarily in Union City, soliciting advertising (R. 113). During the period of his addiction, he had taken many treatments therefor, and, as stated

by him, would sometimes be "off the dope" for two or three years, but he had again been using it for about six months when given the prescriptions by petitioner (R. 107-108).

Petitioner, personally acquainted with Dezonia for many years, had occasionally given him prescriptions for narcotics, and knew that he could personally take during a twenty-four hour period twice the amount of morphine prescribed for him on any of the occasions involved in the indictment (R. 162). Dezonia personally used all the morphine prescribed for him by petitioner, and there was no reason to believe that he would do otherwise (R. 245).

Dezonia, in connection with the prescriptions given him by petitioner between June 1 and June 9, 1940, was advised by petitioner to go to an institution for treatment and told by the latter that he would only prescribe for him until "such time as he could get out of town" (R. 162, 163). Dezonia agreed to follow petitioner's advice and submitted to him a letter from a narcotic institution at Lexington, Kentucky, arranging for his admission there "as soon as he finished his Union City contract" (R. 162, 163).

Dezonia, when petitioner prescribed for him, was suffering pain in all parts of his body (R. 113). The prescriptions given were not in excess of his requirements, and without them he could not have finished his work at Union City (R. 200).

According to the testimony of petitioner, Dezonia in June, 1940, when the prescriptions were issued him, had

enteritis and sciatica or neuritis and had pains in various parts of his body, "one day here and one day there," and that these pains were not solely the result of drug addiction (R. 198); that he gave the prescription to Dezonia "to control the pain and make him slightly useful" (R. 197); that the morphine prescribed helped the enteritis (R. 199); that Dezonia could not have continued his work at Union City without such prescriptions (R. 200); that he did not prescribe in excess of Dezonia's requirement (R. 198).

It does not appear that any other physician diagnosed the condition of Dezonia at or about the time these prescriptions were issued to him and while he testifies that there was nothing wrong with him "aside from the sinus trouble and drug habit" (R. 119), he admits that when the prescrpitions were issued he complained of intense pain (R. 115) and that such "pain was felt in all parts of his body, which became very excruciating" (R. 113), and that his sinus troubled him frequently and was "*very severe*" (R. 114-115).

With respect to the foregoing difference of opinion between Dezonia and petitioner, it is our view that Dezonia's conclusion as to the diseases from which he suffered is destitute of probative value when weighed against the expert opinion of a competent physician, but be that as it may, the conflict is not material unless the statute prohibits a physician from dispensing narcotics to an addict, who suffers addiction alone.

ARGUMENT.

Substantial errors should be corrected by a reviewing court regardless of objection, exception or assignment of error.

> Brasfield vs. U. S., 272 U. S. 448, 71 L. Ed. 345;
> Weems vs. U. S., 217 U. S. 549, 54 L. Ed. 793;
> Crawford vs. U. S., 212 U. S. 183, 53 L. Ed. 465;
> Berger vs. U. S., 295 U. S. 78, 79 L. Ed. 1314;
> New York Central R. R. Co. vs. Johnson, 279 U. S. 310, 73 L. Ed. 706;

A trial in the Federal courts, involving the liberty of the citizens, is not a mere game of skill between adversary counsel, however, experienced or inexperienced they may be, and acting upon that assumption, petitioner invoked the foregoing principle in the petition for a rehearing. He invokes it now.

The argument, designed to establish that the indictment is fatally defective, and that petitioner was convicted as the result of an arbitrary and unconstitutional application of Section 2554 of the internal revenue Code, will be set forth under three headings, and these to some extent summarize the argument.

Preliminary to that argument we state our contention that the statute, while not authorizing a physician to sell Narcotics under the cloak of his profession, does license a physician to do the things done by petitioner in the instant case. Pertinent to that contention is the language used by Yankwich, District Judge, in United States vs. Anthony, 15 Fed. Supp., 553 from which we quote as follows:

> "I am satisfied, therefore, that the Linder Case, and the cases which interpret it, lay down the rule

definitely that the statute does not say what drugs a physician may prescribe to an addict. Nor does it say the quantity which a physician may or may not prescribe. Nor does it regulate the frequency of the prescriptions. Any attempt to so interpret the statute, by an administrative interpretation, whether that administrative interpretation be oral, in writing, or by an officer or by a regulation of the department, would be not only contrary to the law, but would also make the law unconstitutional as being clearly a regulation of the practice of medicine."

I.

The Indictment Herein Is Fatally Defective, and These Defects Being Substantial and Material, Not Merely Formal or Technical, Its Validity May First Be Challenged in the Reviewing Court.

The rule is, as we conceive it, that formal or technical defects are waived by failure to file a demurrer or motion to quash before the trial and that the verdict cures many defects that might sustain a demurrer or motion to quash the indictment. But where the indictment omits an essential element of the offense attempted to be charged, objection may be made even after verdict.

Fleisher vs. U. S., 302 U. S. 218;
Hardesty vs. United States, 6th Circuit, 168 Fed. 25;
Shilter vs. United States, 9th Circuit, 257 Fed. 724;
Cohn vs. United States, 2nd Circuit, 258 Fed. 355;
Goulson vs. U. S., 6th Circuit, 16 F. 2d 44;
Danaher vs. U. S., 8th Circuit, 39 F. 2d 325, 331;
Harris vs. U. S., 8th Circuit, 104 F. 2d 41, 43;
United States vs. Leach (District Court, E. D. Michigan), 291 F. 788.

Defects of substance in the indictment include:

(1) *It does not designate the purchaser.* This is an essential element of a valid indictment for the offense attempted to be charged. Miller vs. United States, 5th Cir., 288 F. 816.

It appears to be the established practice to designate the name of purchaser when a sale is alleged, and so well established is this practice that Judge Otis in United States vs. Hipsch, 34 Fed. Supp. 270, 274, citing Manning vs. U. S., 8th Cir., 31 Fed. 2d 911, 913, refers to such an indictment as being in the "stereotyped form."

(2) *The indictment does not allege that petitioner issued the prescriptions* charged as the means through which sales were made nor that he filled such prescriptions when issued by others. It alleges, however, that he was a "physician dispenser" (R. 21). A "dispensing physician," as that term is used in the Harrison Anti-Narcotic Act, means a vendor of narcotics and not a practicing physician. Young vs. United States, decided Feb. 2, 1942, 62 S. Ct. 510. At the trial, however, there was neither claim nor evidence that petitioner filled any prescriptions, issued by others nor sold narcotics except by means of prescriptions that were filled in good faith by druggists.

If the indictment, alleging that petitioner was a "physician dispenser," could be stretched into a charge that he personally sold narcotics or filled prescriptions, the position of the government would not be improved. There was not a scintilla of evidence of the commission of a criminal or an unlawful act and in that situation conviction would be a denial of due process.

If the evidence should be construed, however strained that construction might be, as showing that petitioner unlawfully issued the prescriptions, that construction would not warrant his conviction since the indictment does not charge that he issued the prescriptions, and conviction on a charge not made in the indictment is a sheer denial of due process of law. Thornhill vs. State of Alabama, 310 U. S. 88.

(3) *The indictment alleges that the sale was not in pursuance of a written order on a form issued by the "Commissioner of Internal Revenue," and such allegation does not state an offense under the statute.*

The offense denounced by Section 2554 is a sale that is not made on a "*particular form of order*" which the purchaser must give the seller, and the offender is "*punished for not using the forms, as the statute requires, or for misusing them.*" Nigro vs. United States, 276 U. S. 332, 345, 351.

The act of December 17, 1914, required that the order form be issued by the "Commissioner of Internal Revenue" but the "particular form of order" required by Section 2554, as it existed at the time of the alleged offenses, if such they be, were committed, was a "written order . . . on a form to be issued by the *Secretary.*" (Italics ours.)

The provision that the form be issued by the "Secretary" is as material as any other part of the Statute and its omission was fatal to the validity of the indictment under the principle stated in Kutler vs. U. S. 3rd Cir., 79 F2d 440, in which the Court said:

> "Where an essential word or clause is omitted from an indictment, such omission is fatal to the

indictment even though the Court may know what was intended."

The provision under consideration is not a mere exception but an essential element of the offense created by the section. But if treated as an exception, its negation would be an indispensable element of a valid indictment. Hale vs. U. S., 4th Cir., 89 F2d 578, 579.

As the defects complained of are substantial, not formal or technical, they are not cured by Title 18, Section 556 of the United States Code. Hagner vs. U. S., 285 U. S. 427; Stumbo vs. United States, 7th Cir., 90 F2d 828.

Nor could the omission of such essential averments have been corrected by a bill of particulars whose office is not to make a bad indictment good but to aid a valid indictment by making the charge more specific or furnishing such additional information as may be reasonably necessary to enable the accused properly to prepare his defense. Floren vs. U. S., 8th Cir., 186 F. 961.

As we construe the opinion in Fleisher, petitioner, vs. United States of America, 302 U. S. 218, 220, it conclusively establishes that the indictment herein is fatally defective and also the right of the petitioner to challenge its validity in the reviewing court without having done so in the trial court.

In the Fleisher case the validity of indictment does not appear to have been questioned either in the trial court or in the Circuit Court of Appeals (91 F2d 404), but this court granted certiorari limited to the question of

whether or not the first count of the indictment stated an offense.

The statute under consideration in the Fleisher case required persons possessing distilling apparatus to register the same with "District supervisor of the Alcoholic Tax Unit in the Bureau of Internal Revenue." The indictment charged failure to register such apparatus "with the collector of Internal Revenue" and this Court held that it did not state an offense under the statute.

Practically the same question is raised by the petition here, and we presume that the government, as it did in that case, will concede error unless valid Treasury Regulations have modified the statute as held by the Circuit Court of Appeals.

As to the Treasury Regulations petitioner states two contentions:

(1) The Act of June 14, 1930, (c. 480, Sec. 3, 46 Stat. 586, U. S. Code, Title 5, Sec. 282 b) restricts the authority that may be delegated by the Secretary of the Treasury with respect to order forms to a delegation of such authority to the Commissioner of Narcotics.

That Section and other pertinent statutes are as follows:

United States Code, Title 5, Sec. 282 b, Subsection (a):

> "The Secretary of the Treasury is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs enumerated in subdivision (a) of section 281 c of this title, upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics.

United States Code, Title 5, Sec. 281 c, Subsection (a):

> "The rights, privileges, powers and duties conferred or imposed upon the Commissioner of Internal Revenue and his assistants, agents, and inspectors, by any law in respect of the taxation, importation, exportation, transportation, manufacture, production, compounding, sale, exchange, dispensing, giving away, possession, or use of narcotic drugs are hereby transferred to, and conferred and imposed upon, the Secretary of the Treasury." (Mar. 3, 1927, c. 348, No. 4 (a), 44 Stat. 1382.)

Internal Revenue Code, Section 2606:

> "The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs conferred upon him by subchapter A and B of this chapter and part V of subchapter A of chapter 27 upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes. 53 Stat., 283."

It will be observed that Title 5, section 281 c, enumerates "taxation" with many other matters to which it refers and Section 282 b, subsection a of the same title, authorizes the Secretary of the Treasury to delegate all powers conferred upon him by section 281 c to the Commissioner of Narcotics.

Section 2606 authorizes the Secretary of the Treasury to delegate powers to the Commissioner of Internal

Revenue with respect to "Internal Revenue taxes" but does not otherwise authorize the transfer of power to that official with respect to the matters set out in Section 281 c, subsection a, which the Secretary was authorized by section 282 b, subsection a, to confer upon the Commissioner of Narcotics, "taxation" being only one of the matters enumerated in section 281 c, subsection a.

(2) The regulations impose no duties upon and transfer no powers to the Commissioner of Internal Revenue with respect to order forms. Section 3, subsection 1-d, Treasury Decision No. 2, issued July 1, 1930, expressly confers upon the Commissioner of Narcotics the powers of the Secretary of the Treasury with respect to the "*prescribing of forms and order forms,*" doing this, however, without any statement of intent to modify the statute as written, but making the exercise of powers therein delegated to the Commissioner of Narcotics subject to the supervision of the Secretary of the Treasury.

Section 4 of Treasury Decision No. 2, expressly delegates to the Commissioner of Narcotics the powers with respect to the matters included in Section 3 that had theretofore been exercised by agents and employees of the Commissioner of Internal Revenue.

Section 5 confers upon the Commissioner of Internal Revenue such powers as had not been delegated to the Commissioner of Narcotics but the specific recitals of sections 3 and 4 control any general delegation of power in section 5.

Sections 3, 4 and 5 of Treasury Decision No. 2 are set out in full in the appendix to this brief.

II.

A Conviction Without Any Evidence of the Commission of a Criminal or Unlawful Act, or Under An Unconstitutional Statute, or By Reason of An Unconstitutional Application of a Valid Law, Is a Denial of Due Process; and Where Such Appears From the Record In A Criminal Case and Is Brought to the Attention of The Appellate Court, the Judgment Should be Set Aside Regardless of Questions Raised in the Trial Court or Errors Assigned in the Reviewing Court.

So imperative is the duty of Federal courts to protect the constitutional rights of the accused that the remedy of *habeas corpus* is available if constitutional rights were denied in the proceedings that resulted in conviction.

Bowen vs. Johnston, 306 U. S. 19, 24, 83 L. Ed. 455;
Johnson vs. Zerbst, 304 U. S. 458, 467, 82 L. Ed. 1461;
Re Nielson, 131 U. S. 176, 182, 33 L. Ed. 118.

And as heretofore shown it is the practice to protect the substantial rights of the accused when a violation thereof is called to the attention of the reviewing court on appeal, even though objection was not made nor exception taken in the trial court.

As we construe the statute under which appellant was convicted, it does not prohibit the acts that resulted in his conviction.

If correct in that view, which will later be more fully presented, the constitutionality of the statute need not be considered.

If the prescriptions issued to Dezonia were not prohibited by the statute, a conviction therefor would be a

denial of due process of law in that there would be no evidence of the commission of a criminal act.

Herndon vs. Lowry, 301 U. S. 242, 81 L. Ed. 1066;
De Jonge vs. Oregon, 299 U. S. 353, 362, 81 L. Ed. 278, 282;
Fiske vs. Kansas, 274 U. S. 380, 71 L. Ed. 1108;
Stromberg vs. California, 283 U. S. 359, 75 L. Ed. 1117.

The validity of the Harrison Act has been sustained by the Supreme Court against the attacks thereon it has considered, this being done, as hereinafter shown, in each instance by a divided court. However, the constitutionality of a statute is not determined by its provisions, abstractly considered, but by the application thereof (Fiske vs. Kansas, 274 U. S. 380), and a statute which is valid when applied to one set of facts may be unconstitutional in its application to another and a different set of facts. Abie State Bank vs. Bryan, 282 U. S. 765.

Title 26, Section 2554, would be unconstitutional if so construed and applied as to punish appellant for issuing the prescriptions involved in the several counts on which he was convicted. The grounds for the conclusion thus stated are:

(1) The statute says nothing about "addicts," does not exclude them from the operation of the term "patient" for which a physician is authorized to prescribe narcotics in the course of his professional practice, and does not adopt any definite standard by which the quantity to be administered or prescribed for a particular addict may be determined.

It is a "*fundamental concept of the common law that crime must be defined with appropriate definiteness.*"

Pierce v. United States, decided December 8, 1941, (62 S. Ct. 237);
Lanzetta v. New Jersey, 306 U. S. 451, 83 L. Ed. 888;
Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 1066.

And unless a sufficiently ascertainable standard of guilt, essential to due process, may be found in the statute, it is void as in conflict with the due process requirements of the Federal Constitution. Herndon vs. Lowry, supra.

Obviously the same rule is applicable in construing an exception to the operation of a statute.

In the instant case there is no evidence of any established or generally accepted medical standard for the treatment of addicts, and in the absence of such evidence it must be presumed that appellant prescribed properly for Dezonia who came to his office seeking relief from the intense pain which the undisputed evidence shows he suffered when the prescriptions were obtained. A contrary conclusion can not be based upon the conflicting opinions of medical experts that appellant should not have prescribed narcotics for Dezonia and particularly where some of these opinions rest upon the concept that the Harrison Act prohibits the prescription of narcotics for an addict.

If a line is drawn between a sale of drugs or narcotics by a physician to any person desiring to purchase the same and the prescription of a quantity not in excess of the reasonable requirements of the patient for a limited period, so as to avoid any probability that he will sell

or dispose of the drugs to others, regulations drawing that line may be upheld as necessary to effectuate the objects of the act as a revenue measure.

But to construe it as regulating or attempting to control the precise quantity of narcotics that may be prescribed for an addict by a physician without setting out any standard by which that quantity is to be measured, brings the act in conflict with the due process requirements of the Federal Constitution.

It may be conceded that regulations intended to effectuate the act as a revenue measure might require that a physician conform his practice to generally accepted medical standards, but that is not the question here presented. Consistent with due process the liberty of a physician may not be made to depend upon the whim or caprice of a jury, left without any guide as to what constitutes proper medical practice except the conflicting opinions of medical experts.

(2) So to apply the statute as to punish appellant for the prescriptions issued to Dezonia is to convert it from a revenue act into a regulation of the practice of medicine. This point will be presented in connection with the discussion of the decisions of the Supreme Court which follows.

The act of December 17, 1914, commonly designated as the Harrison Narcotic Law, has been applied to different states of facts in the following cases:

United States v. Jin Fuey Moy, 241 U. S. 394, 60 L. Ed. 1061;

United States v. Doremus, 249 U. S. 86, 63 L. Ed. 493;

Webb v. United States, 249 U. S. 96, 63 L. Ed. 497;
Jin Fuey Moy v. United States, 254 U. S. 189-192, (65 L. Ed. 214);
State of Minnesota v. Martinson, 256 U. S. 41, 65 L. Ed. 819;
United States v. Balint, 258 U. S. 250, 253, 254, 66 L. Ed. 604, 606;
United States v. Behrman, 258 U. S. 280, 66 L. Ed. 619;
United States v. Wong Sing, 260 U. S. 18, 67 L. Ed. 105;
Linder v. United States, 268 U. S. 5, 66 L. Ed. 819;
United States v. Daugherty, 269 U. S. 360, 70 L. Ed. 309;
Boyd v. United States, 271 U. S. 104, 70 L. Ed. 857;
Alston v. United States, 274 U. S. 289, 71 L. Ed. 1052;
Nigro v. United States, 276 U. S. 332, 72 L. Ed. 600;
Casey v. United States, 276 U. S. 413, 72 L. Ed. 632;
Blockberger v. United States, 284 U. S. 299, 76 L. Ed. 306;
Young v. U. S., 62 S. Ct. 510.

The indictment herein alleges sales in violation of that part of the statute set out in Title 26, Section 2554 of the United States Code and we shall briefly refer to the decisions of the Supreme Court above cited in considering whether the prescriptions issued to Dezonia bring appellant under its condemnation.

In the first of these cases, United States vs. Jin Fuey Moy, 241 U. S. 394, the court sustained a decision of the District Court in quashing an indictment which charged a violation of the statute. The opinion refers to the statute as a "registration and taxing act" and speaking of its objects further said:

> "It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion

> that the district court, in treating those ends as to be reached only through a revenue measure, and within the limits of a revenue measure, was right."

In United States vs. Doremus, the Court sustained the validity of the statute. Chief Justice White and Justices McKenna, Van Devanter and McReynolds dissented on the ground that it was an attempt by Congress to exert a power not delegated but reserved to the States. But each count of the indictment sustained in that case charged that the accused distributed or dispensed *five hundred doses* of morphine to a person named therein for the purpose of gratifying an appetite for the drug and the opinion of majority held that the addict "may not have used this great number of doses for himself" and that the quantity prescribed put it within his power to sell same to others without paying the tax.

In Webb vs. United States, decided on the same date as United States vs. Doremus, the same four Justices dissenting, the court held that it would be a plain perversion of the meaning of the word "prescription" to say that the orders for morphine in that case were prescriptions issued by a physician in the course of his practice. Many of the prescriptions involved in the Webb case were made out in fictitious names, were issued without regard to individual cases, and more than four thousand prescriptions has been issued by the physician during a period of eleven months.

In Jin Fuey Moy vs. United States, 254 U. S. 181, prescriptions, some of them to fictitious persons, calling for large quantities of morphine were furnished indiscriminately to persons who were not patients by a physician

who issued hundreds of prescriptions for narcotics each month.

In State of Minnesota ex rel, vs. Martinson, the court sustained the validity of a statute of the State of Minnesota, regulating the sale of narcotics in that State, and held that such regulation was a valid exercise of the police power of the State which did not interfere "with the enforcement of the Federal Revenue Law," the Harrison Act, which the opinion stated had been sustained as a valid exercise of Congressional power "to levy excise taxes."

In U. S. vs. Balint, the Court based its holding that the statute was violated, although the seller did not know that the drugs sold were narcotics, on the ground that it was a "taxing act, with the incidental purpose of minimizing the spread of addiction."

In U. S. vs. Behrman, the court sustained the validity of an indictment which charged the unlawful issuance of a prescription to one King for one hundred and fifty grains of heroin, 360 grains of morphine, and 210 grains of cocaine. These constituted "more than 3,000 ordinary doses" of the drugs. On the ground that a prescription for such an "enormous number of doses" could only result in the gratification of a diseased appetite of the addict or an "unlawful parting with them to others," the validity of the indictment was sustained. There was a dissenting opinion by Justice Holmes, concurred in by Justices McReynolds and Brandeis.

In U. S. vs. Wong Sing the court held that "prescribed conditions designed to make effective" the act "as a

revenue measure" could be imposed upon the purchaser as well as the seller.

Linder vs. U. S., supra, expressly holds that the Harrison Act is "essentially a revenue measure, and its provisions must be reasonably applied with the primary view of enforcing the special tax"; that the act did not prohibit the administration or prescription of narcotics for addicts, "diseased and proper subjects for such treatment"; that narcotics might be prescribed or administered for "relief of conditions incident to addiction"; that where the quantity prescribed was such that there was *"no reasonable probability"* that the addict would sell or otherwise dispose of the narcotics prescribed, it could not be held that a physician giving such a prescription "necessarily transcended the limits of that professional conduct with which Congress never intended to interfere."

United States vs. Daugherty expresses doubt as to the constitutionality of the act but the question there decided, relating to the validity of certain sentences imposed, has no bearing on any issue presented here.

In Boyd vs. U. S. the evidence showed that the prescriptions in question were *"grossly excessive and unreasonable according to any fair medical standard."* Although the record disclosed that the accused was both distributing and prescribing "most unusual quantities of the drug," the opinion clearly recognizes that it is admissible for a physician in his professional practice to prescribe the drug *either "for curing the patient" or for "the relief of suffering" incident to addiction.*

Alston vs. U. S. holds that Congress under its taxing powers may prohibit purchases except in or from the original stamped package.

In Nigro vs. U. S. the majority opinion held that the words "any person" in Section 2 of the Act of December 17, 1914 (Title 26, Section 2554), were not limited to those required to register and pay a tax by Section 1 of the Act. In the majority opinion the court said:

> "In interpreting the act, we must assume that it is a taxing measure, or otherwise it would be no law at all."

Justices McReynolds, Butler and Sutherland dissented on the ground that the act as therein construed was unconstitutional.

Casey vs. United States dealt with presumptions arising from the possession of unstamped drugs. There was a dissenting opinion, concurred in by Justices McReynolds, Butler, Brandeis and Sanford. In his dissenting opinion Justice Butler said:

> "And it is always to be remembered that this act is to be construed as a measure to 'lay and collect taxes.' It has no other legal existence."

In Blockberger vs. United States, 284 U. S. 299, the court again emphasizes the point that the Harrison Act is essentially a revenue measure, saying:

> "The statute is not aimed at sales of the forbidden drugs qua sales, *a matter entirely beyond the authority of Congress*, but at sales of such drugs in violation of the requirements set forth in Sections 1 and 2, enacted as aids to the enforcement of the stamp

tax imposed by the act. See Alston v. United States, 274 U. S. 289, 294, 71 L. Ed. 1052, 1054, 47 S. Ct. 634; Nigro v. United States, 276 U. S. 332, 341, 345, 351, 72 L. Ed. 600, 603, 604, 607, 48 S. Ct. 388" (Italics ours).

As it appears without dispute in the evidence that Dezonia was suffering intense pain when the several prescriptions were given to him by appellant, that the quantities prescribed were not excessive nor the prescriptions long continued, and that there was no "reasonable probability" that Dezonia would sell or otherwise dispose of the narcotics prescribed, it is clear of doubt that these prescriptions were not unlawful under the provisions of the Harrison Act as it has been construed by the Supreme Court.

In the Linder case, decided by a unanimous court, it is said:

> "Obviously, direct control of medical practice in the states is beyond the power of the Federal government. Incidental regulation of such practice by Congress through a taxing act cannot extend to matters plainly inappropriate to reasonable enforcement of a revenue measure . . . It (the act under consideration) says nothing of 'addicts' and does not attempt to prescribe methods for their medical treatment" (See page 18 of the opinion).

That the incidental regulations therein "must be regarded as means to effectuate the objects of the act with respect to revenue" was held by the Supreme Court In Re Kollock, 165 U. S. 526, sustaining the "Oleomargarine Act."

The principle thus stated and the equally well established principle that the means selected for enforcement must bear a reasonable relation to the revenue features of a taxing act have been so repeatedly recognized and applied by the Supreme Court as not to require further emphasis.

However, as United States vs. Butler, 297 U. S. 1, 80 L. Ed. 477, cites and quotes with approval the Linder case which we regard as controlling of the issue here presented, we quote from that opinion (297 U. S. at pages 68-70) as follows:

> "From the accepted doctrine that the United States is a government of delegated powers, it follows that those not expressly granted, or reasonably to be implied from such as are conferred, are reserved to the states or to the people. To forestall any suggestion to the contrary, the Tenth Amendment was adopted. The same proposition, otherwise stated, is that powers not granted are prohibited. None to regulate agricultural production is given, and therefore legislation by Congress for that purpose is forbidden.
>
> "It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted.
>
> " 'Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land.' M'Culloch v. Maryland, 4 Wheat. 316, 423, 4 L. Ed. 579, 605.
>
> " 'Congress cannot, under the pretext of executing

delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced.' Linder v. United States, 268 U. S. 5, 17. 69 L. Ed. 819, 823, 45 S. Ct. 446, 39 A. L. R. 229.

"These principles are as applicable to the power to lay taxes as to any other federal power.

* * *

"*In Linder v. United States*, 268 *U. S.* 5, 69 *L. Ed.* 819, 45 *S. Ct.* 446, 39 *A. L. R.* 229, *supra, we held that the power to tax could not justify the regulation of the practice of a profession, under the pretext of raising revenue.*" (Italics ours.)

III.

A Finding of Bad Faith in the Administration of Narcotics May Not be Predicated on the Conflicting Opinions of Medical Experts.

The foregoing proposition is sustained by American School of Magnetic Healing vs. McAnnulty, 187 U. S. 94, 47 L. Ed. 90 and Stunz vs. U. S., 8th Cir. 27 F. 2d 575.

In the instant case, the Government offers no evidence to show that there was any generally accepted professional standard for the treatment of addicts. At most, its expert witnesses stated an opinion that a certain course was not a proper practice, but there was no claim by these witnesses or any of them that the view thus expressed was based on generally accepted medical standards.

In this situation, and in view of the testimony of other physicians that appellant's prescriptions were within the bounds of legitimate practice, the testimony of the Government experts is not an adequate basis for a verdict which must rest upon evidence that appellant was not practicing medicine but selling drugs when he prescribed for Dezonia.

CONCLUSION.

In conclusion we wish to emphasize certain points which we regard as of controlling importance.

(1) The prescriptions issued by petitioner were filled by druggists who were registered to sell narcotics, kept records thereof as required by law, and these prescriptions were available for inspection by narcotic agents and were inspected by them over a period of years (R. 43, 45, 117, 118). The trial Judge permitted the Government to prove the issuance of prescriptions other than those referred to in the indictment and the number of such prescriptions offered or referred to in the evidence were nine for Inez Loomis (R. 91), these being issued between February, 1939, and August, 1940, to Mrs. Loomis, who was not an addict but suffered from a chronic ailment (R. 201-202); twenty prescriptions for E. Z. Griffin between June 2 and October 13, 1940, Griffin having sciatica for which he was also treated by petitioner who advised him to go to a narcotic institution for a cure, which he did (R. 202, 219, 220); sixteen prescriptions for Mrs. Alberta Saunders between June 7 and July 27, 1940, she being afflicted with syphilis and fistula, for which she was treated by petitioner (R. 202, 203); thirty-one prescriptions for N. S. Frazier be-

tween June 11 and September 13, 1940, who, in addition to being an addict, had tuberculosis (R. 203) and thirty-six prescriptions between September 11, 1940, and October 20, 1940, for one Welch, who had cancer of the stomach and who on occasions had been given by other physicians much larger quantities of the drug than those prescribed for him by petitioner (R. 204). As to the Welch prescriptions, petitioner did not prescribe for him until requested to do so by the County Judge of Obion County, in which Union City is located, and by the Mayor of that town, the latter being a brother of the United States Marshal for the Western District of Tennessee, who also resides in Union City (R. 111, 209-212).

(2) There were nine prescriptions involved in the counts on which petitioner was acquitted (R. 1-15). Two of these were issued to James M. Cooksey, a decoy (R. 14-15) who was not introduced as a witness in the case. Cooksey had a serious bone disease, from which he was suffering intense pain, and petitioner advised him to go to Memphis to a charity hospital for an operation (R. 163-164). The other seven were issued to a prostitute, or a woman living with a man to whom she was not married (R. 99, 101), used as a decoy by Harry F. Reinert, a narcotic agent, who introduced her to petitioner as his wife (R. 102), and acting on his instructions she represented to petitioner that she had neuritis (R. 75). Petitioner informed her that she had menopausal neuritis and gave her by hypodermic an injection other than narcotics for that trouble, this being a serum, which she objected to taking but which he then and there administered to her (R. 101-103). Considering the fraud which the undisputed evidence shows was practiced on petitioner by the narcotic agents by sending Cooksey and Mrs. Louise

Maynard, alias Mrs. Charles Anderson, to petitioner, it can be readily understood why the jury acquitted petitioner under the counts involving these prescriptions but that is not the point here stressed. *The total number of prescriptions, including those given these decoys, constituted only an inconsequential part of the prescriptions issued by petitioner for other purposes in his general practice.* He treated on an average 25 to 30 patients a day and at times the extent of his practice would be such that he would issue several thousand prescriptions during the course of a year (149). In 1934 petitioner paid Two Hundred ($200) Dollars to the Narcotic Division in order to avoid the notoriety and expense incident to litigation and without consulting counsel (R. 199). With that experience, knowing of the investigations regularly made and believing that there was "pressure" back of such investigations as they affected him (R. 199), it is inconceivable that petitioner would have prescribed narcotics otherwise than in good faith.

(3) As we interpret the statute, petitioner did nothing except what he had a strict legal right to do. But be that as it may, in view of the undisputed evidence that the practice followed by him was in line with the course pursued by reputable physicians generally (R. 45, 94, 240, 244), and the testimony of the expert medical witnesses for the Government that they refused to treat addicts at all, (R. 128, 139), one of them basing such refusal on his understanding that the federal statute prohibited a physician from prescribing narcotics for an addict (R. 134), the lack of any definite standard in the narcotic regulations. (Reg. No. 151. 168, Title 26, p. 1197), and the proven effort of narcotic agent by administrative interpretation to extend the act beyond its scope as

limited by the decision of this court in the Linder case (R. 216), it seems clear of doubt that there should be further clarification of the act and definition of its terms by this court in order that physicians may know what is permitted and what is prohibited by its terms, and particularly whether the criterion by which their guilt or innocence is to be determined is their own judgment as to the needs of the patient in particular cases or that of some other physician who refuses to treat such cases at all.

(4) Regulations, having the force of law, when authorized by law and exercised in accordance with some standard fixed in the law, have been repeatedly upheld by this court, but so far as we have been able to discover the principle has not been extended to the point where the regulations may change an essential element of a statutory crime. Such an extension, using a phrase that appears in the concurring opinion of Justice Cordozo in the Schechter case, would seem to be "*delegation running riot.*"

It is therefore respectfully submitted that the petition should be granted.

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